Supreme Court, U.S.
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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

E. F. ETIE SHEET METAL CO.,

V.

SHEET METAL WORKERS LOCAL UNION NO. 54, AFL-CIO;
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION;
HOUSTON SHEET METAL CONTRACTORS' ASSOCIATION;
SHEET METAL AND AIR CONDITIONING CONTRACTORS'
NATIONAL ASSOCIATION, INC.; and
NATIONAL JOINT ADJUSTMENT BOARD.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. F. ETIE SHEET METAL CO.'S PETITION FOR WRIT OF *CERTIORARI*

JAMES J. LOEFFLER
COUNSEL OF RECORD FOR
E. F. ETIE SHEET METAL CO.
James J. Loeffler, P.C.
The Lyric Centre
440 Louisiana, Suite 1100
Houston, TX 77002
Texas State Bar No. 12480000
(713) 222-6095
Fax (713) 222-7086

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the non-statutory antitrust exemption protects a labor union and non-labor employer combination from the prohibitions of the Sherman Antitrust Act where the members of the labor and non-labor employer combination, consisting of Sheet Metal Workers' Local Union No. 54 ("Local 54") and Sheet Metal Workers' International Association ("SMWIA"), and non-labor employer entities Houston Sheet Metal Contractors' Association ("HSMCA") and Sheet Metal and Air Conditioning Nation Association ("SMACNA"), through the National Joint Adjustment Board ("NJAB"), a national organization jointly created, controlled, staffed, financed, and operated by SMWIA and SMACNA, unilaterally impose non-competitive, non-affordable restraints outside the multi-employer bargaining unit on Petitioner E. F. Etie Sheet Metal Co. ("Etie"), an individual sheet metal contractor which had already timely withdrawn from the multi-employer bargaining unit; especially where, as here, Local 54, bargains in bad faith with Etie by demanding multiple illegal and permissible bargaining demands to impasse, prior to unilaterally submitting the Etie negotiations to "interest arbitration" before the NJAB over Etie's objections, and the NJAB unilaterally imposes an

individual employer, pre-hire contract on Etie and its subcontractors which contains Local 54's illegal and permissive demands and is otherwise illegal and violative of the Sherman Antitrust Act and the National Labor Relations Act ("NLRA")?

A.

Whether the non-statutory exemption from the antitrust laws protects a combination of labor union, Local 54 and SMWIA, and non-labor employer entities, HSMCA and SMACNA, from the prohibitions of the Sherman Antitrust Act when this labor and non-labor combination unilaterally imposes non-competitive, unaffordable restraints on Etie and its subcontractors, after Etie had timely withdrawn from the Local 54's and HSMCA's multi-employer bargaining unit?

B.

Whether the non-statutory exemption from the Sherman Antitrust Act shields a labor and non-labor combination which unilaterally imposes non-competitive, unaffordable restraints, violative of the Sherman Act and the NLRA, upon Etie and its subcontractors though the NJAB, after Etie timely had withdrawn from Local 54's and HSMCA's multi-employer bargaining unit, where, as here, Local 54 bargains in bad faith with Etie by demanding multiple illegal and

permissive bargaining subjects of Etie to impasse and, upon Etie's rejection of these demands, unilaterally submits the Etie negotiations to "interest arbitration" before the NJAB, and the NJAB, despite knowing of Local 54's illegal and permissive bargaining demands, assumes jurisdiction and imposes Local 54's and HSMCA's multi-employer, pre-hire contract on Etie as an individual contractor; such imposed contract containing all but one of Local 54's illegal and permissive bargaining demands, requires that Etie and its sub-contractors rejoin the multi-employer bargaining association, rejoin and finance HSMCA and SMACNA, through the admittedly illegal "Industry Fund" provision, and delegate Etie's exclusive bargaining authority to the HSMCA, thereby making Etie subject to "interest arbitration" for the second time?

2.

Whether Local 54's multiple illegal and permissive bargaining demands made of Etie to impasse, after Etie timely had withdrawn from the multi-employer bargaining unit, and the individual, pre-hire contract unilaterally imposed upon Etie and its subcontractors by SMWIA and SMACNA, though the NJAB, are *per se* violative of the Sherman Antitrust Act and the NLRA, or both?

3.

Whether, in view of Local 54's bad faith bargaining by its multiple illegal and permissive bargaining demands of Etie to impasse, Local 54's unilateral submission to "interest arbitration" was lawful under the NLRA, and whether Etie had any legal obligation whatsoever to bargain further with Local 54 or to participate in, or abide by, the NJAB's bargaining processes or the NJAB's "interest arbitration" decision?

4.

Whether, even if Etie were subject to contractual "interest arbitration" before the NJAB, Etie thereby lost all of its rights and protections afforded it under the Sherman Antitrust Act and the NLRA?

5.

Whether the Fifth Circuit's enforcement of the NJAB's "interest arbitration" award conflicts with, and is repugnant to, public policy and law, as well as the uniform and controlling decisions of this Court and the Circuit Courts, including the Fifth Circuit's own prior decisions, because the award is void and unenforceable?

6.

Whether the Fifth Circuit's affirmance of the District Court's granting of summary judgment against Etie on Etie's Texas common law claims of breach of contract, breach of fiduciary duty and continuing fraud against employer trade associations HSMCA and SMACNA is clearly erroneous and **not** supported by summary judgment evidence?

7.

Whether the Fifth Circuit's holding, affirming the District Court's opinion, that Etie did not terminate or repudiate the multi-employer, pre-hire contract as to Etie is clearly erroneous and **not** supported by summary judgment evidence?

8.

Whether the Fifth Circuit's decision, affirming the District Court's granting of summary judgment against Etie on Etie's Sherman Antitrust Act claim against all members of the labor and non-labor combination and on Etie's NLRA claims against union entities, Local 54, SMWIA, and the NJAB, conflicts with, and is repugnant to, the uniform and controlling decisions of this Court, the Circuit Courts, and of the National Labor Relations Board ("NLRB")

under the NLRA, and is clearly erroneous and not supported by summary judgment evidence?

A LIST OF ALL PARTIES

Etie, Petitioner herein and Defendant/Counter Plaintiff /Appellant below, was an individual Houston-area sheet metal contractor, which all parties agree, in April of 1985, timely withdrew from Local 54's and HSMCA's multi-employer bargaining unit, withdrew its exclusive bargaining agency authority from HSMCA and terminated its membership in union employer trade associations HSMCA and SMACNA.

Local 54 , Plaintiff Counter-Defendant/Appellee below, was and is a local Houston-area labor organization, and one of the many subordinate local unions chartered by its parent international union, SMWIA, in the unionized segment of the sheet metal industry. Local 54 bargained on an individual employer basis with Etie in February /March of 1986, after Etie had withdrawn from Local 54's and HSMCA's multi-employer bargaining unit. When Etie refused to agree to Local 54's bargaining demands, Local 54 unilaterally submitted the bargaining with Etie to "interest arbitration" before the NJAB, over Etie's objections.

HSMCA, Counter-Defendant/Appellee below, was and is a local Houston area union sheet metal contractors' trade association, charted by its parent SMACNA, which represents unionized sheet metal contractors in a multi-employer union bargaining unit with Local 54. In August of 1984, HSMCA and Local 54 agreed to "interest arbitration" before the NJAB for the first time.

SMACNA, Counter-Defendant/Appellee below, was and is a national employer trade association, having a very close relationship with SMWIA in the unionized segment of the sheet metal industry. SMWIA and SMACNA jointly established, and finance, control, and staff the NJAB. SMWIA and SMACNA negotiate a national form union contract called the Standard Form of Union Agreement ("SFUA") containing, among many other form provisions, an "interest arbitration" provision, but the SFUA is not binding on local unions and local union contractors throughout the country unless specifically agreed to by them in whole or in part.

The NJAB, Counter-Defendant/Appellee below, was and is a national organization jointly established, financed, controlled, staffed, and operated by SMWIA and SMACNA for the purpose of resolving contract grievance and other disputes in the unionized sector of the sheet metal industry through "interest arbitration". The NJAB is

composed of an equal number of SMWIA union representatives and SMACNA union contractors. After Local 54 unilaterally submitted the Etie negotiations to the NJAB in May of 1986, the NJAB issued a decision, dated June 27, 1986, ordering Etie to sign an individual employer, pre-hire contract containing all but one of Local 54's bargaining demands, but adding a provision requiring Etie to again join the multi-employer bargaining unit, delegate its exclusive bargaining authority to HSMCA, Etie thereby becoming bound again by "interest arbitration", and requiring Etie and its subcontractors to rejoin and finance HSMCA and SMACNA.

There are no parent or subsidiary companies.

When not designated individually, Local 54, HSMCA, SMWIA, SMACNA, and the NJAB frequently will be designated herein jointly as the "labor and non-labor conspirators", or "the labor and non-labor combination".

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THE OFFICIAL REPORTS OF OPINIONS BY THE DISTRICT COURT AND BY THE FIFTH CIRCUIT

On September 29, 1993, the Fifth Circuit issued an opinion-order denying Etie's Petition for Rehearing *En Banc* and granting, in part, SMACNA's and the NJAB's Petition For Rehearing (Exhibit No. 1 of the Appendix).

On September 3. 1993, the Fifth Circuit issued its decision affirming the District Court's granting of Summary Judgment on all of Etie's claims and enforcing the NJAB's "interest arbitration" award (Exhibit No. 2 of the Appendix).

On April 27, 1992, the District Court entered its Amended Final Judgment (Exhibit No. 3 of the Appendix).

On March 2, 1992, the District Court issued Final Judgment entering judgment in favor of Local 54 on the NJAB's "interest arbitration" award (Exhibit No. 4 of the Appendix).

On March 2, 1992, the District Court issued its Findings of Fact and Conclusions of Law (Exhibit No. 5 of the Appendix).

On December 18, 1991, the District Court issued an order granting Summary Judgment against Etie on one of Etie's NLRA unfair labor practice claims against labor entities Local 54, SMWIA, and the NJAB (Exhibit No. 6 of the Appendix).

On December 9, 1987, the District Court issued an order granting Summary Judgment against Etie on Etie's Sherman Antitrust Act counter claim against all members of the labor and non-labor combination, and on Etie's Texas common law breach of contract, breach of fiduciary duty and continuing fraud claims against HSMCA and SMACNA (Exhibit No. 7 in Appendix).

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

On September 3, 1993, the Fifth Circuit issued a decision affirming Summary Judgment against Etie on Etie's Sherman Antitrust Act claim, holding that the non-statuary exemption from the antitrust laws was applicable to legitimatize all of the labor and non-labor combination's restraints on Etie after Etie had withdrawn from the multi-employer bargaining unit. The Fifth Circuit also affirmed the District Court's Summary Judgment against Etie on Etie's NLRA claims against union entities Local 54, SMWIA, and the NJAB and on Etie's Texas common law claims of breach of contract, breach of fiduciary duty and continuing fraud against HSMCA and SMACNA. The Fifth Circuit affirmed the enforcement of the NJAB's June 27, 1986, "interest arbitration" award imposing Local 54's 1986-89 multi-employer, pre-hire contract with HSMCA on Etie as an individual, out-

side contractor, after severing only the admittedly illegal "Industry Fund" provision.

On September 29, 1993, the Fifth Circuit denied Etie's Petition For Rehearing *En Banc*, and granted, in part, the labor and non-labor combination's Petition for Rehearing by ruling that the "Subcontracting Clause" was a mandatory subject of collective bargaining and includable in the pre-hire contract unilaterally imposed on Etie and its subcontractors. Etie's Petition For Writ of *Certiorari* is timely filed within ninety (90) days after the issuance of the Fifth Circuit's September 29, 1993, decision denying Etie's Petition For Rehearing *En Banc*.

1.

The Sherman Antitrust Act, 15 U.S.C.A. §§1 and 2, *et seq*, as interpreted by the uniform and controlling decisions of this Court, and by the several Federal Circuit Courts as well as the Fifth Circuit, prohibits combinations of labor and non-labor entities from imposing restraints on individual employers, like Etie and its subcontractors, outside of the multi-employer bargaining unit. This Court and the Federal Circuit Courts, including the Fifth Circuit, have uniformly held that the non-statuary exemption from the antitrust laws is inapplicable to restraints imposed by labor and non-labor combinations

on individual contractors outside the bargaining unit. United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965); Connell Construction Company, Inc. v. Plumbers & Steamfitters' Local Union 100, 421 U.S. 616, 621, 628, 95 S.Ct. 1830, 1835 (1975); H. A. Artists & Associates, Inc. v. Actors' Equity Assn., 451 U.S. 704, 101 S.Ct. 2102, 2104 (1981); and Carpenters' Local Union No. 1846, United Brotherhood of Carpenters & Joiners v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982).

The Fifth Circuit's decision conflicts with, and is totally repugnant to, this controlling and uniform Sherman Antitrust Act judicial precedent.

2.

Prior to Local 54's unilateral submission of the Etie bargaining negotiations to the NJAB's "interest arbitration" procedures, over Etie's objections, Local 54 refused to bargain in good faith by demanding multiple permissive and illegal bargaining subjects of Etie to impasse. These bargaining subjects were in and of themselves illegal under the Sherman Antitrust Act or the NLRA, or both. The pre-hire contract imposed upon Etie and its subcontractors by the NJAB contained all but one of Local 54's illegal and permissive bargaining demands, as well as language unilaterally and unlawfully

reimposing HSMCA and SMACNA membership and financial obligations, and requiring Etie and its subcontractors to again become members of the multi-employer bargaining association and thereby become bound again by "interest arbitration".

The Eighth, Ninth, and Second Circuits are uniform in holding that the non-statuary exemption can **never** be applicable where the conduct, means, or restraints imposed by the labor and non-labor combination are, as here, violative of the Sherman Act or the NLRA. Mackey v. Nation Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dism'd.* 434 U.S. 801 (1977); Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council, 817 F.2d 1391, 1393 (9th Cir. 1987); and Local 210, Laborer's International Union of North America v. Labor Relations Division, AGCA, 844 F.2d 69 (2nd Cir. 1988).

The Fifth Circuit's decision conflicts with, and is totally repugnant to, these controlling and uniform Sherman Antitrust Act decisions by the Eighth, Ninth, and Second Circuits.

3.

The NLRA, 29 U.S.C.A. §158, *et seq.*, as uniformly interpreted by the National Labor Relations Board ("NLRB"), declares that Local 54's bad faith bargaining with Etie to impasse, prior to Local 54's

unilateral submission of the Etie negotiations to "interest arbitration" before the NJAB, not only is illegal and violative of the NLRA, but also renders that submission unlawful. SMWIA Local 9 (Concord Metal, Inc.) 301 NLRB No. 32, 136 LRRM 1328 (1991); Electrical Workers' IBEW Local 113 (Collier Electric), 296 NLRB No. 144, 132 LRRM 1297 (1989); and Sheet Metal Workers' Local 54 (Texas Sheet Metal, Inc., *et al.*), 297 NLRB No. 104, 133 LRRM 1129 (1990).

The Fifth Circuit's decision, holding that Etie was "arguably" bound by Local 54's unlawful "interest arbitration" submission to the NJAB, conflicts with, and is totally repugnant to, the uniform and controlling decisions of the NLRB.

4.

The uniform and controlling decisions of the Circuit Courts, and the Fifth Circuit as well, hold that because of Local 54's bad faith bargaining with Etie, Etie had no obligation to negotiate further with Local 54 or to participate in, or to be bound by, any subsequent NJAB "interest arbitration" negotiating process or award. Louisiana Dock Co., Inc. v. NLRB, 909 F.2d 281 (7th Cir, 1990); Associated General Contractors of N. Dakota v. NLRB, 637 F.2d 556, 559 (8th Cir. 1980); General Drivers and Helpers Local Union No. 554 v.

Young and Hay Transportation Co., 522 F.2d 562, 566 (8th Cir. 1975); and Hess Oil & Chemical v. NLRB, 415 F.2d 440 (5th Cir. 1969).

The Fifth Circuit's decision conflicts with, and is totally repugnant to, these uniform and controlling Circuit Court labor law decisions.

5.

This Court, and the Federal Circuit Courts, have uniformly held that, where one party, like Local 54, conditions the consummation of a collective bargaining contract upon the acceptance of illegal and permissive bargaining subjects, effective and lawful negotiations are thereby blocked, and that Etie, the innocent party, need not negotiate further either with Local 54 or participate in, or be bound by, the NJAB's "interest arbitration" negotiating process or award. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 78 S.Ct. 718 (1958); The Idaho Statesman v. NLRB, 836 F.2d 1396, 1400 (D.C. Cir. 1988).

The Fifth Circuit's decision conflicts with, and is totally repugnant to, these controlling and uniform labor law decisions.

6.

This Court, and the uniform and controlling decisions of the Federal Circuit Courts, have held that, even if Etie were subject to a

contractual "interest arbitration" provision, Etie did not thereby lose the rights and protections afforded it under the Sherman Antitrust Act and the NLRA. Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981 (1968); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, *reh. den.* 334 U.S. 835, 68 S.Ct. 1343 (1948); Simpson v. Union Oil Co. of California, 377 U.S. 13, 84 S.Ct. 1051, *reh.den.* 377 U.S. 949, 84 S.Ct. 1349 (1964); Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968); Bales v. Kansas City Star Co., 336 F.2d 439, (8th Cir. 1964); Ring v. Spina, 148 F.2d 647 (2nd Cir. 1945); and Connecticut Importing Co. v. Frankford Distilleries, Inc., 101 F.2d 79 (2nd Cir. 1939).

The Fifth Circuit's decision holding that, since Etie was "arguably" bound by the contractual "interest arbitration" clause, Etie's Sherman Antitrust Act and NLRA claims lacked merit and were barred by the non-statutory exemption, conflicts with, and is totally repugnant to, these uniform and controlling decisions of this Court and the Circuit Courts.

7.

The Fifth Circuit's decision enforcing the illegal "interest arbitration" award against Etie, runs contrary to the doctrine firmly rooted in the common law that a court will refuse to enforce contracts

that violate public policy or law. This is particularly true where, as here, Local 54's multiple illegal and permissive bargaining demands of Etie to impasse, and the many illegal provisions of the individual employer, pre-hire contract imposed upon Etie and its subcontractors by the NJAB, are so clearly intrinsic and basic to the whole scheme of the unlawful contract, and so interwoven with all its terms, that the imposed contract is void and unenforceable and must fall in its entirety. United Paper Workers' International Union v. Misco, Inc, 484 U.S. 29, 108 S.Ct. 364, 370 (1987); W. R. Grace and Co. v. Rubber Workers' Union, 461 U.S. 575, 103 S.Ct. 847 (1983); Hurd v. Hodge, 334 U.S. 24, 34-35, 68 S.Ct. 847, 852-53 (1948); Stroehmann Bakeries v. Local 776, 140 LRRM 2625, 59 FEP Cases 249 (3rd Cir. 1992); General Warehousemen & Helpers, Local 767 v. Standard Brands, Inc., 579 F.2d 1282 (5th Cir. 1978), *reh. den. en banc*, 588 F.2d 829, *cert. dism'd* 443 U.S. 913, 99 S.Ct. 3103 (1979); International Organization of Masters, Mates, & Pilots v. Trinidad Corp., 803 F.2d 69 (2nd Cir. 1986); Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local Union 540 v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983); Perma-Line Corp. of America v. Sign Pictorial and Display Union Local 230, 639 F.2d 890 (2nd Cir. 1981); and Dickstein v. du Pont, 443 F.2d 783 (9th Cir. 1971).

8.

The Fifth Circuit's affirmance of the District Court's granting of Summary Judgment against Etie on Etie's Sherman Antitrust Act, NLRA, and Texas common law claims, and on the issue of Etie's termination and repudiation of the multi-employer, pre-hire contract as to Etie, clearly violates Rule 56(c) of the Federal Rules of Civil Procedure, denied Etie's right to due process of law, and violates the uniform and controlling decisions of this Court and the Federal Circuit Courts, because there was insufficient Summary Judgment evidence. Anderson v. Liberty Hobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986); Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 89 S.Ct. 1391 (1969); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252 (1969); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486 (1962); May Dept. Store v. Graphic Process Co., 637 F.2d 1211 (9th Cir. 1980); Penne v. Greater Minneapolis Board of Realtors, 604 F.2d 1143 (8th Cir. 1979); and Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139 (4th Cir. 1979).

THE STATUTES INVOLVED

The Sherman Antitrust Act, 15 U.S.C.A. Sections 1 and 2, *et seq.*

The National Labor Relations Act ("NLRA"), as amended, 29 U.S.C.A. Section 158, *et seq.*

The pertinent provisions of both the Sherman Antitrust Act and the NLRA are included in Exhibit No. 8 of the Appendix.

STATEMENT OF THE CASE

It is undisputed that Etie, by its certified letter of April 11, 1985, to HSMCA and to Local 54, withdrew from Local 54's and HSMCA's multi-employer bargaining unit and thereby became an individual, non-member contractor in its own bargaining unit, outside of the multi-employer bargaining unit (D 8). It is also undisputed that, in February and March of 1986, Local 54 bargained with Etie as an individual employer outside of the multi-employer bargaining unit (D 10, 11, 12, 13, 14, 15).[1]

In these contract negotiations, Local 54 demanded of Etie to impasse, and Etie rejected, the following bargaining subjects, each of which violate either the NLRA or the Sherman Antitrust Act, or both, according to controlling decisions of this Court, the Fifth and other Federal Circuit Courts, and of the NLRB, as fully set forth in Point 2

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[1] Local 54's and Etie's Exhibits admitted into evidence by the District Court are designated as "P" and "D", respectively, followed by the page number(s), and the pages in the Transcript are designated as "Tr" followed by the page number(s).

of the Argument And Authorities part of this Petition: (1) a pre-hire contract provision, §1, Art. V, requiring Etie and its subcontractors to force their employees, as a condition of employment or continued employment, to become and remain members of Local 54 within eight (8) days (Tr 81, P 9, D 53); (2) an "Industry Fund" provision, §12, Art. VIII, requiring Etie and its subcontractors to pay 13¢ per hour for each hour that their employees worked into this Fund to finance HSMCA and SMACNA, 8¢ to HSMCA and 5¢ to SMACNA, even though Etie had admittedly timely withdrawn its bargaining authority and membership from HSMCA and SMACNA some twelve (12) months before (Tr 187-88, P 9, D 53); (3) an "Integrity Clause", addendum 7, D 53, imposing large monetary fines on Etie and its subcontractors and allowing Local 54 unilaterally to cancel any contract with Etie and its subcontractors if they ever had any ownership in, or did business with, any wholly or partially owned non-union subsidiary or outside contractor (Tr 83); (4) an "Interest Arbitration" provision, §8, Art. X, requiring Etie and its subcontractors, against their wills, to be bound by the NJAB's so-called "interest arbitration" negotiating procedures for the second time (Tr 82); (5) grievance procedure language, §§1-7, Art. X, binding Etie and its subcontractors to any future amendments to the SFUA nego-

tiated by SMWIA and SMACNA, and also imposing NJAB "interest arbitration" upon them to resolve any disagreements with Local 54 over these amendments, even though they were non-members and had no representation on the NJAB (Tr 81); (6) a "SASMI" provision, addendum 1, Art. VIII, P 9, D 53, requiring Etie and its subcontractors to pay 53¢ per hour for each hour that their employees worked into this SMWIA sponsored **national** supplemental unemployment fund, this demand, coupled only with "Industry Fund", and not including the several other benefit plans that Etie told Local 54 it could not afford, added some 2.7% to the cost of every sheet metal construction job because union wage and benefit costs, totalling $18.49 per hour, were 75% of the total cost of each job (66¢ ÷ $18.49 = 3.57% x .75 = 2.7%) (Tr 80, 131-32, 155); (7) other benefit plans, addendum 1, P 9, consisting of several other local and nation trust funds, which Etie not only told Local 54 it could not afford but which also were illegal pursuant to the dictates of Section 302(c)(5)(B) of the NLRA since Etie and its subcontractors, as non-member, outside contractors, had no representation in the administration of any of these union benefit plans and trust funds (D 53); (8) a "Subcontracting Clause", §§1 and 2, Art. II, P 9, prohibiting Etie from doing business with any non-union contractor that did not sign Local 54's pre-hire contract with

HSMCA (Tr 82, D 53); (9) an "Exclusive Hiring Hall" clause, §2, Art. IV, P 9, D 53, requiring Etie and its subcontractors to recognize Local 54 as "the sole and exclusive source of applicants for employment", both Local 54's Mr. Rodgers and Etie's president, Mr. Honea, testified that this "Exclusive Hiring Hall" on its face and in practice admittedly discriminates against non-union employees (Tr 55-59, 80-83); and (10) an individual employer pre-hire contract containing exorbitant wage and benefit demands which Etie informed Local 54 during their negotiations that Etie could not afford and which Local 54 knew would and did force Etie out of business (Tr 166-67, D 16, 18, 26).

Local 54's chief bargaining representative, Mr. Rodgers, testified that, in view of the "Favored Nations" clause found in §5 of Art. XIII of Local 54's multi-employer, pre-hire contract with HSMCA, Local 54 would not agree to sign an individual employer contract with Etie, and the NJAB would not order Etie to sign a contract, without the many bargaining subjects demanded of Etie to impasse by Local 54. Rodgers testified that Local 54 would not compromise on its demands to Etie because the "Favored Nations" clause would have entitled HSMCA and all other signatory union contractors to eliminate all those provisions in their multi-employer and individual

contracts with Local 54, if Local 54 agreed to a contract with Etie without them (Tr 53-54).

When Etie refused to agree to these and other demands, Local 54 unilaterally submitted the Etie negotiations to "interest arbitration" before the NJAB, over Etie's objections (Tr 166, D 52, 53). In May of 1986, Local 54 submitted a written summary of all its bargaining demands of Etie to the NJAB (Tr 166, D 31, 53), and the NJAB assumed jurisdiction over Etie despite knowing that Local 54 had made these bargaining demands of Etie to impasse.

Prior to the receipt of the NJAB's June 27, 1986 decision, a majority of Etie's employees had voluntarily submitted a written petition to Etie wherein they stated that they did not wish to be represented by Local 54. The NLRB had never conducted a representation election at Etie. On June 27, 1986, the exact date of the NJAB's decision but before it was received, Etie sent a letter to Local 54 asserting that Etie had a good faith doubt that Local 54 represented its employees and gave notice that it was going to place its economic proposals to Local 54 into effect (Tr 169-71, D 29, 30, 31).

A few days later, Etie received the NJAB's decision signed by its Chairman and SMWIA's president, Edward J. Carlough, ordering Etie to sign Local 54's multi-employer, pre-hire contract with HSMCA

as an individual employer. This imposed contract contained all but one of the aforementioned contract provisions that Local 54 had demanded of Etie to impasse (P 8). In this decision, SMWIA and SMACNA, though the NJAB, ordered that:

> "E. F. Etie Sheet Metal Co., Inc., shall execute a collective bargaining agreement incorporating the same terms as in the agreement currently in effect between Local 54 and the Houston Sheet Metal Contractors' Association with the exclusion of Article X, Section 8." (P 8).

Although the NJAB purported to excluded the "Interest Arbitration" provision from this individual employer pre-hire contract imposed on Etie, the NJAB unilaterally added §4 of Art. XIII, which required that Etie and its subcontractors to again join the multi-employer bargaining unit, reimposed HSMCA and SMACNA membership, required that they again authorize the HSMCA to act as their exclusive bargaining representative with Local 54, and thereby reimposed "interest arbitration", and ordered Etie and its subcontractors to again finance HSMCA and SMACNA though the "Industry Fund" provision. §4 of Art. XIII states, in part, as follows:

> "By execution of the Agreement the Employer authorizes Houston Sheet Metal Contractors' Assoc. to act as its collective bargaining representative for all matters relating to this Agreement. The parties agree that the Employer will hereafter be a member of the multi-employer bargaining unit represented by said Association..." (P 9).

In a two (2) page article written by SMWIA's president, Edward J. Carlough, which appeared in the *Sheet Metal Workers' Journal* in June of 1983, sent to HSMCA and other SMACNA chapters throughout the country by memo dated June 17, 1983 (D 61), Mr. Carlough designated the non-union contractor "problem" as "the single most over-riding problem facing building trades' unions, including our international association, in the United States and Canada today." This article is entitled, "The Non-union Threat - No Myth," and states, in pertinent part, that:

> "The non-union problem is not a sore that has just boiled over. It has plagued us for the last ten years or more and is now growing at an alarming rate. This union has not stuck its head in the sand and tried to down-play its seriousness to our members. We have also believed and stated in concrete actions that the non-union problem could not be solved **with traditional ideas and methods**.
>
> ...
>
> It is essential for us to undertake new programs and directions to keep and expand the union part of the construction industry. It is encouraging for me in my travels to our local unions across the nation to see more and more local unions **become increasingly aware of the threat to their very existence in the growing non-union element. There is much we can do to stem this tide.**" (emphasis added) (D 38, 61).

In HSMCA's written presentation to the NJAB on August 20, 1984, (D 46), HSMCA presented a discussion of the "Houston disaster"; the impact of the non-union contractors; a statement

decrying the "fast encroachment of non-union" contractor activity; the large jobs lost to non-union contractors just since the first of 1984; a listing of highly automated non-union shops, several graphs depicting the decline of the number of hours worked by union contractors and the rise of hours worked by non-union shops; conclusionary remarks that, "Union wages in the Houston area are now so much greater than non-union wages that our contractors are not even being called on to bid on projects"; a reference to the union contractors as "survivors"; and this statement: "We now have reached the point where sound business practice, technical knowledge and modern equipment can no longer overcome the lower wages and consequently the lower prices of the non-union competition" (D 46).

A letter from SMACNA to HSMCA stated that SMACNA's contractor membership had dropped from 2700 to 2247 contractors since 1980 and that "One lost member is too many; 453 is alarming to me as president of the national association and I am sure it is to you as president of your local chapter." (D 72).

SMACNA's Special Study Report of March 1985, regarding multi-employer bargaining in the sheet metal industry, in a section entitled, "Reasons for Withdrawal", on page 3, notes that if: "[A]contractor is determined to go non-union, withdrawal from a

multi-employer bargaining unit is usually considered a necessary step ... and the most obvious reason for withdrawal is the desire to 'take the union on' in an effort to go non-union. In a number of areas of the country, non-union competition is so severe that some employers have concluded that they have no choice but to pursue this course of action" (D 76).

SMACNA's 1986 Annual Report on page 14, under the title "The Way It Was", discusses several previously mentioned trends in part by stating:

> "The break-up of multi-employer bargaining groups continues... The effectiveness of the local chapter is reduced and withdrawal of bargaining rights often results in withdrawal from chapter membership and financial support. **The record shows that withdrawal of bargaining rights is usually the first step when the contractor plans to remove Art. X §8 procedures, or when the contractor plans to go non-union.**" (emphasis added) (D 75).

Etie's certified letter of April 11, 1985, to both HSMCA and to Local 54, on its face did far more than withdraw from the multi-employer bargaining unit. In addition to withdrawing its exclusive bargaining authority from HSMCA and withdrawing its membership from both HSMCA and SMACNA, Etie's letter also gave notice that Etie was terminating the multi-employer, pre-hire contract as to Etie (D 8). Etie's letter, in pertinent part, states as follows:

> "Please be advised that E. F. Etie Sheet Metal Co., Inc., by this letter is giving notice of its withdrawal of any such bargaining right, authorization or authority, if any, from the Houston Sheet Metal Contractors' Association.
>
> Furthermore, while E. F. Etie Sheet metal Co., Inc., does not believe that it is bound by either the present prematurely extended Union Agreement, or by any previous Union Agreement, with the Sheet Metal Workers' International Association, Local Union Number 54, **this letter shall also serve as notice to both the Houston Sheet Metal Contractor's Association and to the union that E. F. Etie Sheet Metal Co., Inc., wishes to terminate such Union Agreement, if any, at the earliest possible date.**" (emphasis added) (D 8).

On February 10, 1986, Local 54 wrote a letter to Etie and acknowledged that Etie had terminated the multi-employer, pre-hire contract agreement as to Etie (D 11). Etie's bargaining notes of its March/April 1986, individual employer bargaining negotiations with Local 54 reflect Etie's position throughout the negotiations that it had terminated the pre-hire contract, and there was no expressed disagreement from Local 54 (D 16, 18, 26). Both Local 54's representative, Mr. Guy Rodgers (Tr 74-76), and Etie's president, Mr. Roy Honea (Tr 166), testified that Etie had terminated the contract.[2]

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[2] Inexplicably, the Fifth Circuit ruled that Etie relied solely upon the wording of its April 11, 1985, letter as evidence of Etie's intent to repudiate and terminate the pre-hire agreement, totally ignoring Etie's subsequent words and conduct and the fact that both Etie and Local 54 acknowledged that Etie had terminated the agreement.

The "Interest Arbitration" language of §8 of Art. X, taken from the SFUA, agreed to by Local 54 and HSMCA and, on October 1, 1984, inserted in their multi-employer, pre-hire collective bargaining agreement by order of the NJAB (P 5), stated that only disputes between the "local union and the local contractors' association or both," could be submitted to the NJAB's contract resolution procedures (P 6). The 1982-86 multi-employer, pre-hire contract between HSMCA and Local 54, even as amended in October, 1984 (P 6), had no language which would bind Etie or any other individual non-member contractor to undergo the NJAB's post contract negotiating processes or to be bound by the NJAB's contractual directives (Tr 73, 201).[3]

ARGUMENT AND AUTHORITIES

POINT 1.

THIS COURT AND THE FEDERAL CIRCUIT COURTS HAVE UNIFORMLY RULED, AS A MATTER OF LAW, THAT THE NON-STATUTORY EXEMPTION FROM THE SHERMAN ANTITRUST ACT DOES NOT PROTECT

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[3] Yet, the Fifth Circuit concluded that the March 28, 1985, "interest arbitration" language amendment to the SFUA by SMWIA and SMACNA to cover individual, non-member employers (Tr 202-3, D 48), was binding upon Etie, even though that amendment was not agreed upon and incorporated into Local 54's multi-employer, pre-hire contract with HSMCA until April 1, 1986, almost a year after Etie's April, 1985, letter.

ANTI-COMPETITIVE RESTRAINTS UNILATERALLY IMPOSED BY LABOR UNION AND NON-LABOR EMPLOYER COMBINATIONS ON THIRD PARTY INDIVIDUAL CONTRACTORS LIKE PETITIONER ETIE OUTSIDE OF THE MULTI-EMPLOYER BARGAINING UNIT, AND THIS IS ESPECIALLY TRUE WHERE, AS HERE, THE CONDUCT, THE MEANS UTILIZED, AND THE RESTRAINTS IMPOSED ON ETIE AND ITS SUBCONTRACTORS ARE THEMSELVES ILLEGAL AND VIOLATIVE OF THE SHERMAN ANTITRUST ACT AND THE NLRA.

It is undisputed that labor union entities, consisting of Local 54 and SMWIA, and employer trade associations, consisting of HSMCA and SMACNA, joined forces though the NJAB to impose an individual employer contract, and the anti-competitive restraints contained therein, on Etie and its subcontractors outside of the multi-employer bargaining unit. Like the facts in this Court's decision in United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965), these labor and non-labor co-conspirators imposed the multiple anti-competitive restraints contained in Local 54's multi-employer, pre-hire contract with HSMCA on Etie as an individual employer outside of the multi-employer bargaining unit, after Local 54 was informed by Etie in their individual bargaining negotiations of February/March 1986, that Etie could not afford Local 54's bargaining demands.

Local 54's Mr. Rodgers readily admitted in his testimony that Local 54 was not about to make any concessions or agree to any different provisions with Etie than Local 54 had in its multi-employer, pre-hire contract with HSMCA because the "Favored Nations" clause in that contract would allow all other contractors to immediately demand similar contractual language.

A.

TAKEN ALONE, WITHOUT CONSIDERING THE MULTIPLE ILLEGAL BARGAINING DEMANDS MADE OF ETIE TO IMPASSE BY LOCAL 54 AND THE ILLEGALITY OF THE INDIVIDUAL EMPLOYER CONTRACT IMPOSED UPON ETIE BY THE NJAB, VIOLATIVE OF BOTH THE SHERMAN ANTITRUST ACT AND THE NLRA, THE ACTION TAKEN BY THE MEMBERS OF THIS LABOR AND NON-LABOR COMBINATION CONSTITUTED AN UNLAWFUL RESTRAINT OF TRADE VIOLATIVE OF THE SHERMAN ANTITRUST ACT, NOT EXEMPTED BY THE NON-STATUARY EXEMPTION.

This Court and the controlling decisions of the Federal Circuit Courts, as well as the Fifth Circuit itself, have uniformly ruled that the non-statutory exemption offers no protection when a union and a non-labor party agree to restrain competition in a business market. In Connell Construction Company, Inc. v. Plumbers & Steamfitters' Local Union 100, 421 U.S. 616, 621, 628, 95 S.Ct. 1830, 1835 (1975), this Court held that the non-statutory exemption from the antitrust laws does not apply to concerted actions or agreements between

union and non-labor parties to impose a "subcontracting clause" because:

> "The basic sources of organized labor's exemption from federal antitrust laws are sections 6 and 20 of the Clayton Act, 39 Stat 731 and 738, 15 U.S.C. §17 and 29 of U.S.C. §52, and the Norris-La Guardia Act, 47 Stat 70, 71 and 73, 29 U.S.C. §§104, 105 and 113. These statutes declare that labor unions are not combinations or conspiracies in restrain of trade, and exempt specific union activities including secondary picketing and boycotts, from the operation of the antitrust laws.... **They do not exempt concerted action or agreements between unions and non-labor parties.**
>
> ...
>
> Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition on those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally ...**the non-statutory exemption offers no similar protections when a union and a non-labor party agree to restrain competition in a business market...**" (pp 834 and 835) (emphasis added).

In H. A. Artists & Associates, Inc. v. Actors' Equity Assn., 451 U.S. 704, 101 S.Ct. 2102, 2104 (1981), this Court held that union antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade; a restraint of trade being no less so because a union participates. In Wickham Contracting Co., Inc. v. Board of Education, 715 F.2d 21 (2nd Cir. 1983), the Second Circuit held that a union may be subjected to antitrust liability for demanding that a contractor withhold business from subcontractors who do not employ members of the union, and that proof of a con-

spiracy between the union and non-labor parties to restrain competition is unnecessary to make out a violation of the Sherman Act. The Second Circuit held that unions cannot use the guise of protecting labor concerns or of their members to impose direct restraints on business markets through agreements or combinations with non-labor organizations and, when they do, unions lose whatever immunity they otherwise may have been granted under the antitrust laws.

The Fifth Circuit's decision also conflicts with and is totally repugnant to its own prior antitrust cases decisions. In Carpenters' Local Union No. 1846, United Brotherhood of Carpenters & Joiners v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir. 1982), that court ruled that the non-statutory antitrust exemption did not apply where labor and non-labor entities have combined to restrain competition. The Fifth Circuit held that " ...union or employer attempts at indirect effects on market through direct restraints on competition, antitrust laws are violated due to means chosen and not [the] end sought to be achieved", and also ruled that the non-statutory exemption was not available to protect the conduct of contractor employers. Similarly, the Fifth Circuit, in Embry-Riddle University v. Ross Aviation, 504 F.2d 896, 903 (5th Cir. 1974), ruled that the union and the incumbent employer violated the Sherman Act by negotiating exorbitant wages

and benefits, far in excess of what the government was obligated to pay to the follow-on contractor, in order to enable the incumbent contractor to regain the government contract, even though there was only one bargaining unit and no other illegality.

The District Court, in the case at bar, erroneously held that all of the labor and employer co-conspirators were entitled to the non-statutory exemption from the Sherman Act, since Etie was a member of the HSMCA in August of 1984 and, "HSMCA was representing Etie and thus, any conspiracy between HSMCA and Local 54 could not have had as its aim the imposition of conditions on Etie as an outside employer." (pg A-57, District Court opinion, Exhibit No. 7 in the Appendix). The Fifth Circuit held that the non-statutory exemption applied because: (a) the "Interest Arbitration" clause was introduced as a part of a union contractor wage reduction strategy; (b) the "Interest Arbitration" clause was part of wage negotiations when Etie belonged to HSMCA; (c) Etie allegedly "... had the chance to pull out of the agreement entirely"; and (d) unlike the employer in United Mine Workers v.Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965), Etie allegedly had a chance to have input into the individual contract imposed upon Etie (pg A-27, Fifth Circuit opinion, Exhibit No. 2 in the Appendix).

These conclusions are not only clearly erroneous, they are preposterous!!! They hold that once an individual contractor like Etie becomes bound by "interest arbitration", that contractor thereby looses all its rights and protections under the Sherman Antitrust Act and the NLRA.

The Fifth Circuit's finding that Etie " ...had the chance to pull out of the agreement entirely", in 1983 is not only totally irrelevant, but lacks any factual support whatsoever. HSMCA's executive secretary, Barbara Gibbons, testified that only one contractor was allowed to withdraw from HSMCA prior to the 1983 premature, mid-contract extension of the 1982-85 contract to April of 1986 (Etie's Supplemental Submission to the District Court, pp 20-21, Gibbons Depo. pp 180-194). Etie's president, Mr. Roy Honea, testified without contradiction that no one from either HSMCA or Local 54 ever told him Etie had a right to get out of the contract in 1983 (Etie's supplemental Submission to the District Court, pp 26, 29, Honea Depo. pp 55-58, 367-69, 383-87, 576-77, 608).

Without stating how or when Etie could have avoided the "interest arbitration" provision, the Fifth Circuit then erroneously ruled that Etie's Sherman Antitrust claim was distinguishable from Pennington, *supra*, because "Etie allegedly cannot claim to be the

victim of a labor contract it could not affect" (pg A-27, Fifth Circuit opinion, Exhibit No. 2 in the Appendix). As aforesaid, these conclusions are preposterous and have no bearing whatsoever on the fact that the labor and non-labor conspirators imposed restraints on Etie and its subcontractors outside of the multi-employer bargaining unit. Furthermore, **Etie could not affect the contract because Local 54's bad faith bargaining precluded any possibility of a contract ever being reached!** What these clearly erroneous rulings dictate is that once an individual contractor like Etie becomes subject to "interest arbitration", that contractor forever waives any right thereafter to defend itself against violations of the Sherman Antitrust Act or the NLRA.

The fact that the labor and non-labor co-conspirators in this case may have had the lowering of union employer wage costs to try to meet competition from non-union contractors as one of their objectives, did not give them any right to, or excuse them from, violating both the Sherman Antitrust Act and the NLRA by unilaterally imposing anti-competitive restraints on individual employers, like Etie, outside the multi-employer bargaining unit; restraints which they could not afford.

As this Court has held on numerous occasions, the Sherman Antitrust Act is its own measure of right or wrong in what it permits or forbids, and the courts cannot substitute their judgment for the policies of the Act. The judgments of the District Court and the Fifth Circuit **cannot** be set up against the Sherman Act in a supposed combination of the Act's policy with the alleged good intentions of the labor and employer co-conspirators, even if some good results. Good intentions (if any really existed) are no defense to conduct which violates the Sherman Antitrust Act. United States v. United States Gypsum Co., 340 U.S. 76, 71 S.Ct. 160 (1951).

B.

ETIE'S SHERMAN ACT CLAIM IS AT LEAST TEN TIMES STRONGER AND FAR MORE COMPELLING THAN THE ANTITRUST CLAIMS IN THE AFOREMENTIONED U.S. SUPREME COURT AND CIRCUIT COURT DECISIONS BECAUSE LOCAL 54 BARGAINED IN BAD FAITH WITH ETIE BY DEMANDING MULTIPLE ILLEGAL AND PERMISSIVE BARGAINING SUBJECTS OF ETIE TO IMPASSE, PRIOR TO LOCAL 54'S UNILATERAL SUBMISSION TO THE NJAB'S "INTEREST ARBITRATION" BARGAINING PROCEDURES, AND THE PRE-HIRE CONTRACT IMPOSED UPON ETIE AND ITS SUBCONTRACTORS BY THE NJAB CONTAINS SEVERAL PROVISIONS THAT ARE *PER SE* ILLEGAL UNDER EITHER OR BOTH THE SHERMAN ANTITRUST ACT AND THE NLRA.

The clear and unmistakable result of the anti-competitive and illegal restraints imposed by the labor and non-labor co-conspirators

in this "interest arbitration" charade was to preclude and restrain contractors like Etie from effectively withdrawing from the multi-employer bargaining unit, going "non-union", and joining the ever growing ranks of the non-union employer competition.

What is even more remarkable than the lower courts' refusal to abide by the aforementioned uniform and controlling judicial and NLRB precedent, is the fact that neither the District Court nor the Fifth Circuit ever once considered Local 54's multiple illegal bargaining demands, violative of Sections 8(b)(3) and 8(d) of the NLRA, the illegality of Local 54's unilateral submission to "interest arbitration" before the NJAB, or the illegality of the individual employer, pre-hire contract imposed upon Etie and its subcontractors outside of the multi-employer bargaining unit, with reference to Etie's Sherman Act antitrust or NLRA claims.

The NLRB has uniformly held that "...bad faith bargaining by a party prior to its unilateral submission of unresolved issues to interest arbitration will render that submission unlawful...". Electrical Workers' IBEW Local 113 (Collier Electric), 296 NLRB No. 144, 132 LRRM 1297 (1989). In Sheet Metal Workers' Local 54 (Texas Sheet Metal, Inc., *et al.*), 297 NLRB No. 104, 113 LRRM 1129 (1990), the NLRB, citing its holding in Collier, *supra*, held that:

> "The Collier majority went on to emphasize, however, that the presence of an interest arbitration provision in a collective bargaining agreement does not relieve employers and unions of their responsibilities to engage in good-faith bargaining.... **Thus, bad faith bargaining by a party prior to its unilateral submission of unresolved issues to interest arbitration will render that submission unlawful...**" (emphasis added).

The "interest arbitration" provision, even if applicable, could not and did not "arguably" bind Etie to interest arbitration because Local 54's unilateral submission was illegal and a part of the labor and non-labor conspirators' antitrust conspiracy. In unilaterally submitting the Etie negotiations to "interest arbitration", after bargaining in bad faith with Etie, local 54 also violated Section 8(b)(1)(B) of the NLRA because there was no reasonable basis for Local 54's claim that Etie was bound by "interest arbitration". SMWIA Local 9 (Concord Metal, Inc.) 301 NLRB No. 32, 136 LRRM 1338 (1991).

The use of the words "interest arbitration" for the NJAB's contract dictation process is specious. The Fifth Circuit in Mobile Mechanical Contractors' Assoc. v. Edward J. Carlough and SMWIA, 664 F.2d 481 (5th Cir. 1981), *cert. den'd* U.S. 975 (1982), and the Second Circuit in NLRB v. Sheet Metal Workers' International Assoc., Local 38, 575 F.2d 394 (2nd Cir. 1978), have correctly ruled that this

very same NJAB is a negotiating forum and not an arbitration tribunal.

By reason of Local 54's refusal to bargain in good faith with Etie in violation of Sections 8(b)(3) and 8(d) of the NLRA, there was not and could not be a lawful impasse, regardless of the parties' statements at the time. Local 54's bad faith bargaining released Etie from any duty it might otherwise have had to negotiate further with Local 54, and allowed Etie to legally refuse to participate in, or be bound by, any subsequent NJAB "interest arbitration" negotiating process or award, even if Etie were otherwise bound to that process. Louisiana Dock Co., Inc. v. NLRB, 909 F.2d 281 (7th Cir, 1990); Associated General Contractors of N. Dakota v. NLRB, 637 F.2d 556, 559 (8th Cir. 1980); General Drivers and Helpers Local Union No. 554 v. Young and Hay Transportation Co., 522 F.2d 562, 566 (8th Cir. 1975); and Hess Oil & Chemical v. NLRB, 415 F.2d 440 (5th Cir. 1969). Furthermore, this Court and the D.C. Circuit have also uniformly held that where one party, like Local 54 in the case at bar, conditions the consummation of a collective bargaining contract upon the acceptance of illegal and/or permissive, non-mandatory bargaining subjects, effective and lawful negotiations are thereby blocked, and the innocent party, like Etie, need not negotiate further, either

with Local 54 or participate in the NJAB negotiating processes. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 78 S.Ct. 718 (1958); and The Idaho Statesman v. NLRB, 836 F.2d 1396, 1400 (D.C. Cir. 1988).

The Eighth Circuit in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dism'd.* 434 U.S. 801 (1977), the Ninth Circuit, in Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council, 817 F.2d 1391, 1393 (9th Cir. 1987), and the Second Circuit, in Local 210, Laborer's International Union of North America v. Labor Relations Division, AGCA, 844 F.2d 69 (2nd Cir. 1988), have ruled that the non-statutory exemption can **never** be applicable where the conduct, means or restraints utilized are themselves violative of the Sherman Act or the NLRA. These three Circuit Court decisions hold that national labor policy favoring collective bargaining under the NLRA **cannot** be given preeminence over the antitrust laws unless: (a) the agreement between the union and the employer imposes a restraint which effects only those parties and does not have anti-competitive effects outside of the bargaining unit; (b) there is a **valid** collective bargaining agreement; (c) the anti-competitive restraints were arrived at as the result of ***bona fide***, good-faith (lawful) arms-length bargaining; (d) the restraints imposed

concern legal and mandatory (not permissive), subjects of bargaining; and (e) there is a legitimate and lawful union objective.

None of these requirements are met by the conduct of the labor and non-labor conspirators in the case at bar because: (a) Etie was not a member of HSMCA's and Local 54's multi-employer bargaining unit when it negotiated with Local 54 in February/March of 1986 and thereafter; (b) the restraints imposed upon Etie and its subcontractors had anti-competitive effects outside of the multi-employer bargaining unit; (c) the multi-employer, pre-hire contract was not a valid and lawful contract, at least as to outside contractors like Etie which did not voluntarily agree to it; (d) many of the restraints imposed upon Etie and its subcontractors were illegal under the Sherman Act and the NLRA; (e) Local 54 bargained in bad faith with Etie prior to its unilateral submission to the NJAB; (f) Local 54's submission was unlawful and Etie was not bound thereby; (g) SMWIA and SMACNA, through the NJAB, illegally assumed jurisdiction over Etie despite the fact that they knew from Local 54's written submission to the NJAB in May of 1986, that Local 54 had bargained to impasse with Etie over illegal and permissive, non-mandatory bargaining demands; (h) the conduct, means and methods utilized, and the restraints unilaterally imposed by the labor and non-labor conspirators

were violative of both the Sherman Act and the NLRA; and (i) at least one of the labor and non-labor conspirators' objectives, and certainly the result of their actions, was to preclude individual contractors like Etie from effectively withdrawing from the multi-employer bargaining unit, from going non-union, and from joining the ever-growing ranks of the non-union competition. A conspiracy between a labor organization and even an unwilling employer may form the basis of a Sherman antitrust lawsuit. C & K Coal Co. v. United Mine Workers of America, 537 F.Supp. 480 (W.D., Pa., 1982). Conspiracies under the Sherman Antitrust Act are not dependent on any overt act other than the act of conspiring. No formal agreement needs to be shown to establish a "contract, combination, or conspiracy" to restrain trade in violation of the Sherman Antitrust Act, and a silent combination or understanding to restrain trade, which may be implied from a course of dealings, is sufficient to constitute a violation of the Act. Reed Bros., Inc. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975), cert. den'd 423 U.S. 1055, 96 S.Ct. 787 (1976). In New York Shipping Association v. Federal Maritime Commission, 854 F.2d 1338, 1373 (D.C. Cir. 1988), the District of Columbia Circuit affirmed the Federal Maritime Commission's finding that the International Longshoremen Association's (ILA) container rules were not enforceable, even

though the ILA defended on the ground that the container rules were a product of the collective bargaining process. The D.C. Circuit held that the freedom to bargain under the NLRA did **not** amount to freedom to contract for otherwise unlawful provisions or to impose a restraint of trade.

The lower courts' decisions, granting and then affirming Summary Judgment against Etie on Etie's valid Sherman Antitrust claim, not only reflect a fundamental ignorance of the Sherman Antitrust Act, the non-statutory exemption, and the NLRA, but also conflict with and are repugnant to the uniform and controlling decisions of this Court, the various Federal Circuit Courts, including the Fifth Circuit's own prior decisions, and the NLRB's controlling labor law decisions under the NLRA.

POINT 2.

BOTH LOCAL 54'S MULTIPLE ILLEGAL AND PERMISSIVE BARGAINING DEMANDS OF ETIE TO IMPASSE AND THE INDIVIDUAL EMPLOYER PRE-HIRE CONTRACT UNILATERALLY IMPOSED UPON ETIE AND ITS SUBCONTRACTORS BY THE NJAB ARE VIOLATIVE OF THE SHERMAN ANTITRUST ACT AND THE NLRA, OR BOTH.

THE PRE-HIRE CONTRACT PROVISION. Local 54 demanded to impasse and the NJAB imposed a "pre-hire" contract (Tr 81, 167-68, D 53). This pre-hire contract language required Etie

and its subcontractors' to force their employees, as a condition of employment or continued employment, to join and become members of Local 54 within 8 days. Both Local 54's business manager, Guy Rodgers, and Etie's president, Roy Honea, testified that Local 54 demanded to impasse that Etie sign a pre-hire contract. Local 54's Mr. Rodgers also testified that, to his knowledge, Local 54 had never signed a contract with a construction employer that did not include a provision that employees were required to join Local 54 within 8 days (Tr 42-45). This Court has held that a union's insistence upon a pre-hire contract to impasse is illegal. Jim McNeff, Inc. v. Todd, 461 U.S. 260, 103 S.Ct. 1753 (1983); and NLRB v. Iron Workers' Local Union 103, 434 U.S. 335, 98 S.Ct. 651 (1978). The Third Circuit has recently held that a pre-hire contract must be voluntary and cannot be coerced. Limbach Co. v. Sheet Metal Workers' International Assoc. AFL-CIO, 949 F.2d 1240 (3rd Cir. 1991).

THE "INDUSTRY FUND" PROVISION. Local 54 demanded of Etie to impasse, and the NJAB unlawfully imposed upon Etie, a provision entitled "Industry Fund" (Tr 82, 83, P 8, 9 §12 of Art. VIII). "Industry Fund" is not only unlawful under the NLRA but also *per se* illegal under the Sherman Act. National Electrical Contractors' Assoc. v. National Constructors' Assoc., 768 F.2d 492 (4th

Cir. 1982); NLRB v. Sheet Metal Workers' International Assoc. Local 38, 575 F.2d 394 (2nd Cir. 1978); and NLRB v. Detroit Resilient Floor Decorators' Local Union 2265, 317 F.2d 269 (6th Cir. 1963). This illegal provision required Etie and its subcon-tractors to pay 13¢ for each hour that their employees worked into this Fund to finance HSMCA and SMACNA; 8¢ to HSMCA and 5¢ to SMACNA (Tr 187-88), even though Etie admittedly had timely withdrawn its membership from HSMCA and SMACNA more than 12 months before.

THE "INTEGRITY CLAUSE". Local 54 demanded this illegal clause to impasse and then tried to get the NJAB to impose this clause on Etie (Tr 83, D 53, addendum 7). This clause unlawfully imposed large monetary fines on Etie and its subcontractors and allowed Local 54 unilaterally to cancel any contract if they ever had any ownership in, or did business with, any wholly or partially owned non-union subsidiary or outside contractor. Etie submits that the "Integrity Clause" is violative of the Sherman Act; however, there is absolutely no question such a clause is illegal, and merely non-mandatory and permissive under the NLRA. Sheet Metal Workers' Local Union No. 91, affiliated with SMWIA v. NLRB, 905 F.2d 417

(D.C. Cir. 1990); and Sheet Metal Workers Local 91, 305 NLRB No. 164, 139 LRRM 1097 (1991).

THE "INTEREST ARBITRATION" PROVISION. Local 54 also demanded of Etie to impasse "interest arbitration" (Tr 82, §8 of Art. X). Local 54 thereby unlawfully coerced and restrained Etie and its subcontractors against their wills to be bound by the NJAB's "interest arbitration" procedure for the second time. NLRB v. Greensboro Printing Pressman and Assistants' Union No. 319, 549 F.2d 308 (4th Cir. 1977); NLRB v. The Columbus Printing Pressmen & Assistants Union No. 252, 543 F.2d 1161 (5th Cir. 1976), enforcing 219 NLRB No. 54 (1975); Sheet Metal Workers' International Assoc. Local 14 v. Aldrich Air Conditioning, Inc., 717 F.2d 456 (8th Cir. 1983); and NLRB v. Sheet Metal Workers' International Assoc., Local 38, *supra*. While the NJAB's decision purported to exclude "interest arbitration", the NJAB unilaterally inserted §4 of Art. XIII, which required Etie and its subcontractors to rejoin and finance HSMCA and SMACNA though the illegal "Industry Fund" provision, rejoin the multi-employer bargaining association, and to again give HSMCA their exclusive bargaining authority. Since HSMCA was bound by "interest arbitration", Etie and its subcontractors also became bound to "interest arbitration" again.

THE GRIEVANCE PROCEDURE. Local 54 demanded and the NJAB imposed on Etie grievance procedure language, §§1-7 of Art. X, which dictated that Etie and its subcontractors be automatically bound by any future amendments to the Standard Form Union Agreement (SFUA) agreed to by SMWIA and SMACNA (Tr 81). Under this contractual language, Local 54 could reopen the contract and negotiate any such amendment. Failing agreement with Etie, Local 54 could then submit any such dispute to the NJAB for resolution, and non-member Etie and its subcontractors would again be subject to the dictates of the NJAB and be stuck again with "interest arbitration" without any representation on the NJAB.

THE "SASMI" AND OTHER BENEFIT PLANS. Local 54 demanded to impasse that Etie agree to "SASMI" and other benefit plans, and the NJAB imposed these provisions on Etie (Tr 80, D 53, Art. VIII, addendum 1). "SASMI" required Etie and its subcontractors to pay 53¢ per hour for each hour their employees worked into SMWIA's **national** supplemental unemployment fund even though Etie told Local 54 it could not afford these demands, Etie was no longer a member of HSMCA and SMACNA, and Etie's employees would never have received any benefits under "SASMI". "SASMI" violates the Sherman Act because, coupled with the "Industry Fund"

provision alone, they would have added some 2.7% to the cost of every sheet metal construction job, regardless of the number of hours worked by Etie and its subcontractors' employees, since union wage and benefit costs, totalling $18.49 per hour, comprise 75% of the cost of every union job (Tr 131-32, 155) (66¢ ÷ $18.49 = 3.57% x 0.75 = 2.7%). National Electrical Contractors' Assoc. v. Nation Constructors Assoc., *supra*. Local 54 also demanded of Etie to impasse, and the NJAB ordered Etie to sign, a contract containing several other local and national union trust funds, which the co-conspirators knew Etie could not afford. These demands and the imposition thereof are illegal pursuant to Section 302(c)(5)(B) of the NLRA because Etie and its subcontractors, as non-members, would not have been represented in the administration of any of these union benefit plans and trust funds. National Electrical Contractors' Assoc. v. National Constructors' Assoc., *supra*; Mobile Mechanical Contractors' Assoc., Inc. v. Edward J. Carlough and SMWIA, *supra*; NLRB v. Sheet Metal Workers' International Assoc., Local 38, *supra*.

THE "SUBCONTRACTING CLAUSE". Local 54 also demanded of Etie to impasse and the NJAB imposed a so-called "Subcontracting Clause" (Tr 82, D 53). While this Court, in Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 102 S.Ct. 2071

(1982), held (without any antitrust consideration) that such subcontracting clauses may be legal under the NLRA if they have been voluntarily entered into and the contract of which they are a part is not otherwise illegal, neither condition exists here. This clause is a further unlawful extension of the "subcontracting clause" found to be a violation of the Sherman Act by this Court in Connell Construction Company, Inc. v. Plumbers' & Steamfitters' Local Union 100, *supra*. Although the employer in Connell, *supra*, did not argue its case on a theory of conspiracy between the union and the employer association, this Court held, in part, as follows:

> "The "most favored nation" clause in the multi-employer agreement promised to eliminate competition between members of the association and any other subcontractors that Local 100 might organize. By giving members of the association a contractual right to insist on terms as favorable as those given any contractor, it guaranteed that the union would make no agreement that would give an unaffiliated contractor a competitive advantage over members of the Association.
>
> ...
>
> In that portion of the market, the restriction on subcontracting would eliminate competition on all subjects covered by the multi-employer agreement, even on subjects unrelated to wages, hours, and working conditions.
>
> Success in exacting agreements from general contractors would also give Local 100 power to control access to the market for mechanical subcontracting work. **The agreements with general contractors did not simply prohibit subcontracting to any non-union firm; they prohibited subcontracting to any firm that did not have a contract with Local 100. The union thus had complete**

control over subcontracting work offered by general contractors that had signed these agreements. Such control could result in significant adverse effects on the market and on consumer – effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions. For example, if the union thought the interests of its members would be served by having fewer subcontractors competing for the available work, it could refuse to sign collective-bargaining agreements with marginal firms. C.f. Mine Workers v. Pennington, *supra*.

...

Here, Local 100, by agreement with several contractors made non-union subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anti-competitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a non-statutory exemption from the antitrust laws." (emphasis added).

The Fifth Circuit first ruled that the "Subcontracting Clause" was an illegal, non-mandatory subject of bargaining. When the labor and non-labor conspirators filed a Petition For Rehearing on that issue, citing an old NLRB case, the Fifth Circuit changed its mind and ruled that the "Subcontracting Clause" was a mandatory subject of bargaining totally ignoring the Sherman Antitrust Act issue, (pg A-5 Fifth Circuit opinion, Exhibit No. 2 in the Appendix). The "Subcontracting Clause" is found in §1 and 2 of Art. II (P 9), and states, in part, as follows:

> "No Employer shall subcontract or assign any of the work described herein which is to be performed at a job site **to any contractor, subcontractor, or other person or party who fails to agree in writing to comply with the conditions of employment contained herein including, without limitations, those relating to union security, rates of pay and working conditions, hiring and other matters covered hereby for the duration of the project."** (emphasis added).

The Seventh Circuit, in NLRB v. Chauffeurs, Warehousemen & Helpers, Local 525, 773 F.2d 921, 924 (7th Cir. 1985), held that "subcontracting clauses" are presumptively invalid. The Sixth Circuit has recently held that such "subcontracting" clauses are illegal and not simply work preservation in nature. Teamsters Local Union 957 v. NLRB, 934 F.2d 732 (6th Cir.1991). In so holding, the Sixth Circuit ruled as follows:

> "Work preservation clauses are generally characterized by the fact that they define the group of permissible subcontractors in terms of economic standards rather than in terms of union affiliation.... [A] **union signatory clause** [on the other hand] **focuses on union affiliation by prohibiting an employer from subcontracting work to any employer not signatory to or approved by the union."** (emphasis added) (pp 736 and 737).

By this clause Etie was illegally prohibited from subcontracting with any third party contractor unless that contractor agreed to a contract with Local 54 containing all of the illegal, permissive, non-mandatory subjects contained in Local 54's multi-employer, pre-hire contract

with HSMCA. Furthermore, although §1 purports to limit its application "for the duration of the project", once an Etie subcontractor was forced to sign Local 54's pre-hire contract with HSMCA, that contract would bind the subcontractor at least for the length of the contract and maybe longer under the "Interest Arbitration" clause contained therein. There is no other contractual language that exempts a subcontractor or allows it to withdraw from the contract after a job for Etie is completed.

This "Subcontracting Clause" is a restraint of trade in violation of the Sherman Antitrust Act because union entities Local 54, SMWIA, and the NJAB combined with employer trade associations HSMCA and SMACNA, imposed an illegal pre-hire contract on Etie and on neutral, independent third-party contractors outside the multi-employer bargaining unit through coercive pressure on Etie. Such clause clearly and unmistakably restrains and coerces neutral, third-party employers with whom Local 54 had no contractual or bargaining relationship, and whose employees were not represented by Local 54.

THE EXCLUSIVE "HIRING HALL" CLAUSE. The exclusive "Hiring Hall" provision demanded to impasse of Etie by Local 54 and imposed upon Etie by the NJAB's decision (Tr 82, D 53), required Etie and its subcontractors to recognize Local 54 as

"the sole and exclusive source of referral of applicants for employment" (§2, Art. IV, P 9). While the language purports to require Local 54 to select and refer applicants for employment without discrimination, Local 54's Mr. Rodgers testified that, to his knowledge since at least 1982, Local 54 had never referred a non-union employee to a contractor for employment, and that non-union employees could never qualify for referral under "Group A" of §2 (Tr 55-59). Etie's president, Mr. Honea, testified that Local 54 had never referred a non-union employee to Etie during the ten year period Etie was a signatory to Local 54's multi-employer pre-hire contract with the HSMCA (Etie's Supplemental Submissions, Honea Depo. pp 55-58, 367-69, 383-87,576-77, 608). This Court, in Wooddell v. Electrical Workers Local 71, _____ U.S. _____, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991), and the Fifth Circuit, in NLRB v. Associated General Contractors, Inc., 349 F.2d 449 (5th Cir. 1965), have held that an actual practice of discrimination under an exclusive hiring hall is illegal.

THE PROVISION REQUIRING ETIE AND ITS SUBCONTRACTORS TO REJOIN AND FINANCE HSMCA AND SMACNA AND AGAIN DELEGATE THEIR EXCLUSIVE BARGAINING AUTHORITY TO THE HSMCA. The pre-hire contract imposed upon Etie and its subcontractors also included §4 of Art. XIII, which the NJAB unilaterally inserted for its own purposes. This

clause reimposed HSMCA and SMACNA membership and financial obligations on Etie and its subcontractors through "Industry Fund", and required that they again join the multi-employer bargaining unit and authorize the HSMCA to act as their exclusive bargaining representative. As aforesaid, this again imposed "interest arbitration" on them because HSMCA was bound by interest arbitration. This provision is not only a violation of the NLRA, but is also a violation of the Sherman Antitrust Act. Frito-Lay, Inc. v. Local Union No. 137, International Bro. of Teamsters, 623 F.2d 1354 (9th Cir. 1980); Mobile Mechanical Contractors' Assoc., Inc. v. Edward J. Carlough and SMWIA, *supra*; and NLRB v. Sheet Metal Workers' International Assoc., Local 38, *supra*.

THE NJAB HEARING AND LOCAL 54'S LAWSUIT. Local 54's unilateral submission to the NJAB, after it had bargained in bad faith with Etie, the NJAB's wrongful assumption of jurisdiction over Etie after it knew what illegal and permissive bargaining demands Local 54 had made of Etie to impasse, the NJAB's decision imposing the illegal pre-hire contract on Etie and its subcontractors, and Local 54's frivolous lawsuit, are all part of the labor and non-labor conspiracy and are *per se* violative of the Sherman Act and the NLRA. Local 54's lawsuit is frivolous, lacks any reasonable basis in fact and

law, is further evidence of the antitrust conspiracy, and was filed for the unlawful, retaliatory motive of punishing Etie for its refusal to sign the illegal contract and Etie's decision to go non-union, within the meaning of this Court's decision in Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161 (1983). The District Court and the Fifth Circuit also totally ignored Etie's position that, in Texas, a contract to do a thing which cannot be done without a violation of the law is void. Commercial Standard Fire and Marine Co. v. Galindo, 484 S.W.2d 635 (Tex.Civ.App.– El Paso, 1972, writ ref'd n.r.e.). See also 17 Am. Jur. 2nd §216.

POINT 3.

IN VIEW OF LOCAL 54'S BAD FAITH BARGAINING BY ITS MULTIPLE ILLEGAL AND PERMISSIVE BARGAINING DEMANDS OF ETIE TO IMPASSE, VIOLATIVE OF BOTH THE SHERMAN ANTITRUST ACT AND THE NLRA, LOCAL 54'S UNILATERAL SUBMISSION TO "INTEREST ARBITRATION" BEFORE THE NJAB WAS UNLAWFUL AND ETIE HAD ABSOLUTELY NO LEGAL OBLIGATION TO BARGAIN FURTHER WITH LOCAL 54, OR TO PARTICIPATE IN, OR ABIDE BY, THE NJAB'S BARGAINING PROCESSES OR ITS DECISION.

The NLRB has uniformly held that "... bad faith bargaining by a party prior to its unilateral submission of unresolved issues to interest arbitration will render that submission unlawful...." Electrical Workers' IBEW Local 113 (Collier Electric), *supra*. In Sheet Metal

Workers' Local 54 (Texas Sheet Metal, Inc.), *supra*, the NLRB, citing its holding in Collier, *supra*, held that:

> "The Collier majority went on to emphasize, however, that the presence of an interest arbitration provision in a collective bargaining agreement does not relieve employers and unions of their responsibilities to engage in good-faith bargaining.... **Thus, bad faith bargaining by a party prior to its unilateral submission of unresolved issues to interest arbitration will render that submission unlawful...**" (emphasis added).

Local 54's bad faith bargaining released Etie from any duty it might have had to negotiate further with Local 54, and allowed Etie legally to refuse to participate in, or abide by, any subsequent NJAB negotiating process or award, even if Etie were otherwise bound to that process. Louisiana Dock Co. v. NLRB, *supra*. Associated General Contractors of N. Dakota v. NLRB, *supra*. General Drivers and Helpers Local Union No. 554 v. Young and Hay Transportation Co., *supra*. Hess Oil & Chemical v. NLRB, *supra*. Where one party, like Local 54, conditions the consummation of a collective bargaining contract upon the acceptance of illegal and permissive bargaining subjects, effective and lawful negotiations are thereby blocked, and the innocent party, like Etie, need not negotiate further, either with Local 54, or participate in, or be bound by, the NJAB negotiating process or award. NLRB v. Wooster Div. of Borg-Warner Corp., *supra*. The Idaho

Statesman v. NLRB, *supra*. Inexplicably, the District Court and the Fifth Circuit ignored all this controlling case authority.

POINT 4.

EVEN IF ETIE WERE SUBJECT TO "INTEREST ARBITRATION", ETIE DID NOT THEREBY LOSE THE RIGHTS AND PROTECTION AFFORDED IT UNDER THE SHERMAN ANTITRUST ACT AND THE NLRA.

This Court has long since ruled that even if an antitrust complainant has voluntarily signed and is party to a contract, this does not preclude a Sherman Act Antitrust lawsuit, even when the claimant participated in the conspiracy to the extent of utilizing the illegal arrangements formulated and carried out by others. For example, a franchised dealer who complies with a restrictive franchise agreement can charge a conspiracy between the franchisor and himself or between the franchisor and other franchise dealers whose acquaintance was induced by the communicated danger of termination of their franchises. Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981 (1968). Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996 *reh. den.* 334 U.S. 835, 68 S.Ct. 1343 (1948). Retailers who adhere to a manufacturer's suggested retail prices do not become co-conspirators with the manufacturer in an illegal price-fixing conspiracy even though they

know that their compliance is expected by the manufacturer in consonance with the manufacturer's price-maintenance policy; a dealer whose consignment agreement was canceled for failure to adhere to the fixed resale price can bring suit under the antitrust laws even though, by signing the agreement, he had to that extent become a participant in the illegal, competition-destroying scheme; a gasoline service station lessee's agreeing to retail gasoline at prices fixed by the lessor does not preclude his recovering from the lessor for canceling the lease because of the lessee's refusal to adhere to the fixed prices; and a liquor distributor who agrees with the manufacturer to maintain fixed prices in selling the liquor to retailers, and whose liquor supply is cut off by the distiller for his refusal to adhere to the fixed prices, is not precluded from recovering against the distiller under the antitrust laws. Simpson v. Union Oil Co. of California, 377 U.S. 13, 84 S.Ct. 1051, *reh. den.* 377 U.S. 949, 84 S.Ct. 1349 (1964). Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968). Bales v. Kansas City Star Co., 336 F.2d 439, (8th Cir. 1964). Ring v. Spina, 148 F.2d 647 (2nd Cir. 1945) Connecticut Importing Co. v. Frankfort Distilleries, Inc., 101 F.2d 79 (2nd Cir. 1939). Nevertheless, the lower courts ignored all of these decisions and, after erroneously finding that Etie was "arguably" bound by contractual "interest arbitration",

granted Summary Judgment against Etie, ruling that Etie's valid Sherman Act claim was barred by the non-statutory exemption.

POINT 5.

THE FIFTH CIRCUIT'S ENFORCEMENT OF THE NJAB'S "INTEREST ARBITRATION" AWARD CONFLICTS WITH, AND IS REPUGNANT TO, PUBLIC POLICY AND LAW AND THE UNIFORM AND CONTROLLING DECISIONS OF THIS COURT, AND THE CIRCUIT COURTS, INCLUDING THE FIFTH CIRCUIT'S OWN PRIOR DECISIONS, BECAUSE THE AWARD IS VOID AND UNENFORCEABLE.

The Fifth Circuit, as the District Court did before it, totally ignored the uniform decisions of this Court, of the Federal Circuit Courts, and the Fifth Circuit's prior decisions, which hold that even real, ***bona fide*** **arbitration awards**, which are based upon fraud or duress, or which violate public policy or law, are void and unenforceable. General Warehousemen & Helpers, Local 767 v. Standard Brands, Inc., 579 F.2d 1282 (5th Cir. 1978), *reh. den. en banc*, 588 F.2d 829, *cert dism'd*, 443 U.S. 913, 99 S.Ct. 3103 (1979). This is particularly true where, as here, Local 54's multiple illegal and permissive bargaining demands of Etie to impasse, and the many illegal provisions of the contract imposed by the NJAB's "interest arbitration" award, are so clearly intrinsic and basic to the whole scheme of the unlawful contract, and so interwoven with all its terms,

that the contract must fall in its entirety. United Paper Workers' International Union v. Misco, Inc, 484 U.S. 29, 108 S.Ct. 364, 370 (1987); W. R. Grace and Co. v. Rubber Workers' Union, 461 U.S. 575, 103 S.Ct. 847 (1983); and Hurd v. Hodge, 334 U.S. 24, 34-35, 68 S.Ct. 847, 852-53 (1948). In the recent case of Stroehmann Bakeries v. Local 776, 140 LRRM 2625, 59 FEP Cases 249 (3rd Cir. 1992), an arbitration award reinstating a discharged delivery driver was held by the Third Circuit to have violated public policy because the arbitrator made no finding on the allegation that the driver had sexually harassed a female employee of a customer. In International Organization of Masters, Mates, & Pilots v. Trinidad Corp., 803 F.2d 69 (2nd Cir. 1986), the Second Circuit held that "...it's clear that an arbitrator's award repugnant to the NLRA will not be enforced" and "It would contravene public policy to confirm an arbitrator's award enforcing a provision of a collective bargaining agreement violative of federal law." In Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local Union 540 v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983), the Fifth Circuit itself reversed and rendered judgment against the enforcement of an arbitrator's award which directed the employer to reinstate an over-the-road truck driver who was caught drinking liquor on duty, because the award violated

public policy. In Perma-Line Corp. of America v. Sign Pictorial and Display Union Local 230, 639 F.2d 890 (2nd Cir. 1981), the Second Circuit reversed a district court ruling enforcing an arbitrator's award because the award was based upon a "superseniority" contract clause which was illegal under the NLRA. In Dickstein v. du Pont, 443 F.2d 783 (9th Cir. 1971), the Ninth Circuit ruled that antitrust defenses are allowed where, as is the case at bar, the intrinsic illegality of the contract is so clear that enforcement would make the court a party to the precise conduct forbidden by law.

Local 54 would not have signed an individual employer contract with Etie, and the NJAB would not have ordered Etie to sign the contract, without the many illegal and permissive provisions contained therein because, as Local 54's Mr. Rodgers testified, the "Favored Nations" clause would have entitled HSMCA and all other signatory union contractors to eliminate all those provisions in their contracts with Local 54.

POINT 6.

THE FIFTH CIRCUIT'S AFFIRMANCE OF THE LOWER COURT'S GRANTING OF SUMMARY JUDGMENT AGAINST ETIE ON ETIE'S TEXAS COMMON LAW CLAIMS OF BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY AND CONTINUING FRAUD AGAINST EMPLOYER TRADE ASSOCIATIONS HSMCA AND SMACNA,

IS CLEARLY ERRONEOUS AND IS NOT SUPPORTED BY SUMMARY JUDGMENT EVIDENCE.

Relying solely on the deposition testimony of HSMCA union contractor member, Arthur Gowan, to the effect that "maybe" 50% of the sheet metal union contracts in other jurisdictions included §8 Art. X., and ignoring Mr. Gowan's own testimony that it was "wrong" to state that, therefore, the NJAB would dictate the terms of new contracts in those other areas because the NJAB handled many jurisdictional disputes and contract grievance matters that had nothing to do with the imposition of contract terms (Depo. of Arthur Gowan pp 122-23), the Fifth Circuit confirmed the District Court's erroneous ruling that the authority of HSMCA to reassign Etie's exclusive bargaining authority to the NJAB "...was implicitly authorized by the nature of the [1974] agreement." This, in spite of the following undisputed facts: (a) that HSMCA had never done this before; (b) that HSMCA's multi-employer, pre-hire contract with Local 54 had always contained a prohibition against any delegation of bargaining authority to the NJAB; (c) that no one had ever requested Etie's permission to redelegate its exclusive bargaining authority; (d) that Etie's individual contractor 1974 exclusive bargaining authorization contract with HSMCA inherently prohibited any such reassignment;

and (f) that Etie's president testified without contradiction that he never even heard or knew of the NJAB until late 1984 (Etie's Supplemental Submission, pp 26, 29, 32-33, Honea Depo. pp 55-58, 367-69, 383-87, 576-77, 608).

Etie's 1974 written, exclusive bargaining agency contract with HSMCA was signed by Etie's president, Mr. Roy Honea, on February 28, 1974, and by HSMCA's then-president, W. C. Lipscomb, on March 11, 1974 (P 1). Etie was induced to join HSMCA (and thereby SMACNA), and relied on promises from HSMCA's representatives that the HSMCA would faithfully and **exclusively** represent Etie in all of its bargaining and other relationships with Local 54, and that neither the HSMCA nor Etie could or would reassign this exclusive bargaining authority or membership to any other entity (Tr 145-46). Etie knew nothing of any so-called "interest arbitration" or of the SFUA, or of the NJAB, when it was induced to sign the exclusive bargaining agency contract with HSMCA in 1974 (Tr 182-83). Etie's 1974 exclusive delegation of bargaining authority contract with HSMCA created a fiduciary relationship between Etie and HSMCA, and stated, in part, as follows:

> "The Houston Sheet Metal Contractors' Association is hereby authorized and empowered to act in behalf of the undersigned **as its exclusive bargaining agent in negotia-**

tions with Local 54 of the SMWIA, AFL-CIO, of Houston, Texas, a labor organization, to act for its benefit, and the benefit of the Association. This authorization is given in consideration of the promise of the Association made through its duly authorized officers and agents to carry out duties of collective bargaining with the above-named Union." (emphasis added) (P 1).

Prior to HSMCA's unlawful surrender of Etie's exclusive bargaining authority to the NJAB in August of 1984, §8 of Art. X of all of HSMCA's multi-employer, pre-hire contracts with Local 54 always precluded any such NJAB control over bargaining (Tr 49, 73, 150, 192-3) by stating: "Nothing contained in this Article shall apply to any controversy or dispute arising out of any notice of reopening of this Agreement as provided in Article XIII thereof." (P 2). This unilateral redelegation of Etie's exclusive bargaining authority to the NJAB also violated Art. I §§4 and 5 of HSMCA's By Laws, which dictated that: "Member firms may vote on all matters coming before the Association, each member firm shall be entitled to one vote. Membership shall not be transferred or assigned." (D 59). Barbara Gibbons, HSMCA's executive secretary, testified that the HSMCA never conducted a vote of its membership as to the reassignment of their (or Etie's) exclusive bargaining agency authority to the NJAB (Tr 190-91), as required by HSMCA's By-Laws (D 59). The 1982-86 multi-employer, pre-hire contract, even as amended in 1984, had no

language which would force Etie or any other individual, non-member contractor to undergo the NJAB's post-negotiating processes or to be bound by the NJAB's contractual directives (Tr 73, 201).

Recognizing the problem that individual, non-member contractors were not bound by the NJAB's "interest arbitration" procedures, on March 28, 1985, HSMCA and SMACNA amended the "Interest Arbitration" language of §8, Art. X in the SFUA, so as to cover individual, non-member employers (Tr 202-3). However, this new "interest arbitration" language was not agreed to by Local 54 and HSMCA, or inserted into their multi-employer 1986-89 contract, until April 1, 1986, almost a year **after** Etie had timely withdrawn from the multi-employer bargaining unit. Because an agent is exclusively entrusted with certain personal responsibilities, duties, and privileges, does not, in the absence of specific authority, authorize such agent to appoint other agents, without the knowledge and consent of the principal. Hicks Rubber Co. v. Columbia Tire & Rubber Co., 252 S.W. 216 (Tex. Civ. App. - Austin, 1923, no writ). There is nothing in Etie's 1974 bargaining agency contract with HSMCA, or any facts then existing, or in any subsequent Etie conduct, which expressly or by implication gave HSMCA the power or authority to redelegate Etie's exclusive bargaining agency authority to the

NJAB, or to any other third-party. The principle *delegatus non potest delegare*, meaning a representative cannot delegate his authority, is applicable. HSMCA lacked the authority to bind Etie to the NJAB's bargaining processes and contractual dictates without Etie's explicit knowledge and consent. Tex.Jur.3rd, Agency, pp 36-37.

Co-conspirators HSMCA and SMACNA did not meet their Summary Judgment burden of proof under Rule 56(c) of the Federal Rules of Civil Procedure, and there is absolutely no evidence that Etie knew of the use of the NJAB for contract negotiation matters in other jurisdictions, or when, where, how often it had been done, or under what circumstances.

POINT 7.

THE FIFTH CIRCUIT'S HOLDING, AFFIRMING THE DISTRICT COURT'S OPINION, THAT ETIE DID NOT TERMINATE OR REPUDIATE THE MULTI-EMPLOYER, PRE-HIRE CONTRACT AS TO ETIE, IS CLEARLY ERRONEOUS AND NOT SUPPORTED BY SUMMARY JUDGMENT EVIDENCE.

Based solely on the fact that Etie continued to pay the wages and benefits called for in the multi-employer, pre-hire contract until July 1986, the Fifth Circuit held that Etie did not terminate or repudiate the contract. The undisputed facts, totally ignored by the courts below, are that Local 54 itself acknowledged in writing to Etie

on February 10, 1986, that Etie had terminated the Agreement (D 11), Etie's bargaining notes of the negotiation meetings it had with Local 54 in early 1986, clearly indicate Etie's position throughout the negotiations that it had terminated the Agreement, without any disagreement from Local 54 (D 16, 18, 26). Both Etie's president, Roy Honea (Tr 166), and Local 54's Guy Rodgers (Tr 74-76) testified that Etie had terminated the contract. In Plumbers' Local Union 72 v. John Payne Co., Inc., 850 F.2d 1535 (11th Cir. 1988), the Eleventh Circuit held that an employer may repudiate a pre-hire contract by its conduct alone, if its actions are sufficiently "bald and open" or "open and notorious" to give the union notice of its intent to repudiate.

Prior to the NLRB's John Deklewa decision, 282 NLRB 184 (1987), *enf'd* 843 F.2d 770 (3rd Cir. 1988) *cert. den.* 488 U.S. 889, 109 S.Ct. 222 1988, construction contractors could terminate pre-hire contracts even during their term. In its 1987 Deklewa decision, *supra*, the NLRB ruled, for the first time, that **while otherwise lawful** pre-hire agreements were fully enforceable and not voidable during their term, when the pre-hire agreement expires, the union enjoys no presumption of majority status and the employer has no duty to bargain with the union. Etie repudiated and terminated the pre-hire

contract two (2) years before Deklewa, and the Fifth Circuit has ruled that Deklewa will not be given retroactivity in the Fifth Circuit. United Brother-hood of Carpenters and Joiners Local Union 953 v. Mar-Len of Louisiana, Inc., 906 F.2d 200 (5th Cir. 1990). The NLRB also ruled in Deklewa, *supra*, that the appropriate bargaining unit is the individual employer unit and not the multi-employer unit, and that the validity of pre-hire agreements were limited to the initial term of the bargaining agreement, whether one, two, or three years. The NLRB held that neither the employer nor the union could circumvent the limits of Section 8(f) of the NLRA, or the right to repudiate the pre-hire agreement at the initial termination date, by advance waivers (*i.e.*, so-called "interest arbitration" provisions), or even by agreements of excessive duration, that is, agreements in excess of three years. In NLRB v. Pacific Erectors, Inc., 718 F.2d 1459, 1463 (9th Cir. 1983), the Ninth Circuit held that the effective duration of a pre-hire agreement is limited to a one (1) to three (3) year term, and that an employer's right to repudiate a pre-hire agreement cannot be restricted by contract. See also Painter's District Council No. 3 Pension Fund v. Johnson, 566 F.Supp. 592, 598 (W.D., Mo. 1983), wherein the court held that language prohibiting the termination of a pre-hire contract was unenforceable and violated

public policy. The labor and non-labor conspiracy in the case at bar is an attempt through "interest arbitration" to bind Etie and its subcontractors to an unlawful, pre-hire contract for a period of seven (7) years! That is, from the initial 1982-85 contract, to 1986, because of the premature contract extension in 1983, and then three more years from April 1, 1986 through March 31, 1989.

The Fifth Circuit's conclusion that Etie failed to terminate or repudiate the multi-employer, pre-hire contract as to Etie, and its statement that "Etie's sole action that it claims constitutes a repudiation was a letter sent from Etie to HSMCA on April 11, 1985", are both contrary to undisputed fact and the acknowledged understanding of both Etie and Local 54. Certainly, Etie's April 11, 1985, letter, coupled with its subsequent conduct and the acknowledged acquiescence by Local 54, were not "ambiguous" or equivocal. Furthermore, even if the facts of repudiation were "ambiguous", Summary Judgment against Etie under rule 56(c) was totally improper.

POINT 8.

THE FIFTH CIRCUIT'S RULINGS AGAINST ETIE AFFIRMING THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT AGAINST ETIE ON ETIE'S SHERMAN ACT ANTITRUST CLAIM, ON ETIE'S NLRA CLAIMS, AND ON ETIE'S TEXAS COMMON LAW CLAIMS CONFLICT WITH, AND ARE REPUGNANT TO, THE UNIFORM AND CONTROLLING DECISIONS OF THIS

COURT, THE CIRCUIT COURTS, AND THE NLRB, AND ARE CLEARLY ERRONEOUS AND NOT SUPPORTED BY SUMMARY JUDGMENT EVIDENCE.

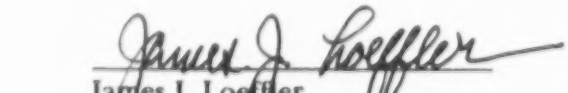
Summary Judgment against an antitrust complainant is an extreme remedy and should not be granted unless the movant has established its right to judgment with such clarity as to leave no room for controversy; it must be found that Etie is not entitled to recovery under any discernable circumstances. May Dept. Store v. Graphic Process Co., 637 F.2d 1211 (9th Cir. 1980); Penne v. Greater Minneapolis Area Board of Realtors, 604 F.2d 1143 (8th Cir. 1979); and Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139 (4th Cir. 1979). Summary judgments and summary procedures should be used only sparingly in complex antitrust litigation where the proof is largely in the hands of the labor and non-labor co-conspirators, and hostile witnesses thicken the plot. Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 89 S.Ct. 1391 (1969); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252 (1969); and Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486 (1962). In deciding a summary judgment motion, this Court has held that "...the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his

favor." Anderson v. Liberty Hobby Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

CONCLUSION

Etie respectfully requests that its Petition For Writ of *Certiorari* be granted and that, after submission of briefs and a hearing before the Court, if same be necessary, that this Court reverse all of the clearly erroneous judgments of the lower courts and render judgment for Etie on its Sherman Antitrust Act, NLRA and common law claims, grant Etie's Motion For Summary Judgment on Liability, and remand the case to another Federal District Judge for a hearing on Etie's loss of future profits and other damages.

Respectfully submitted,



James J. Loeffler
James J. Loeffler, P.C.
Texas Bar No. 12480000
The Lyric Centre
440 Louisiana, Suite 1100
Houston, TX 77002
(713) 222-6095
Fax: (713) 222-7086